No. 2956

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR LAKE (a corporation),
*Plaintiff in Error,*

vs.

HEINZ SPRINGE,
*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR.

LUTHER ELKINS,
RICHARD P. HENSHALL,
*Attorneys for Defendant in Error.*

*Filed this.....day of October, 1917.*

*FRANK D. MONCKTON, Clerk.*

*By.....Deputy Clerk.*



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The plaintiff in error, as assignee of one Edward O. Allen, who in turn was assignee of one J. Dalzell Brown, brought suit to recover certain moneys paid by J. Dalzell Brown for improvements erected by him on the lands of the defendant in error, Heinz Springe, and for certain moneys paid by the said J. Dalzell Brown and by his assignor, L. J. Shuman, upon the purchase price, pursuant to the terms of agreement of sale, of date September 20, 1906, where in the defendant in error, Heinz Springe, agreed to sell to the said L. J. Shuman and the said L. J. Shuman agreed to purchase from said Heinz Springe certain real

and personal property situate in Lake County, California.

The Court below granted defendant in error a non-suit on the ground that plaintiff in error is estopped by the judgment rendered in a certain action of ejectment in which defendant in error, Heinz Springe, was plaintiff and said J. Dalzell Brown plaintiff in error's assignor, by mesne assignment was the principal defendant, from proving upon the trial below:

(1) That J. Dalzell Brown, the assignee of the vendee in said contract of date September 20, 1906, was not in default in the payment of the final installment of the purchase price, pursuant to the contract of sale;

2. That the vendor, Heinz Springe, at any time was in default in carrying out any of the terms or provisions of the said contract of sale; or

(3) That there was a rescission by mutual consent of the vendor and vendee (or by the vendee) of the said contract of sale (Tr. pp. 174-182).

While it is not material to the matters for consideration before this Court, defendant in error unqualifiedly denies the statement appearing in the brief of plaintiff in error (pp. 1-2) as follows:

> "The real meaning of said judgment of nonsuit is that although plaintiff's assignor was *once possessed of a lawful and just claim against defendant, Springe, for approximately $20,000.00 actual cash paid to Springe and for $30,000.00 actually paid out for improvements* on Springe's land, these just and valid claims

> were irretrievably lost, nevertheless, because, as the trial court conceives it, the judgment in ejectment is a conclusive determination against their validity. The purchase price which Springe agreed to take for the land was $47,-000.00 The judgment of nonsuit leaves in Springe's hands not only the land but also more than $50,000.00 in cash and improvements." (The italics are ours.)

Adopting the method of counsel for plaintiff in error, we state that the "real meaning of said judgment of nonsuit" is that the plaintiff in error, the assignee, *once removed,* of J. Dalzell Brown, and who admittedly paid but $1.00 for the assignment to it of a *possible right of action* by J. Dalzell Brown against the defendant in error shall not be permitted, six years after all of the rights of said J. Dalzell Brown, as vendee, under said contract of sale, had been foreclosed by a judgment rendered in an action of ejectment tried and determined in the Superior Court of the County of Lake, State of California, to come into the United States District Court for the Northern District of California and re-litigate the alleged or supposed rights of said J. Dalzell Brown, as vendee under said contract of sale, and to attempt to support such claim by a *theory* of its case and by *proof* wholly *different and inconsistent* with that presented by J. Dalzell Brown in the action of ejectment.

There is no warrant for the statement in the brief of plaintiff in error that J. Dalzell Brown was ever possessed of a *"lawful and just"* claim against the defendant in error, Springe, for the return to its as-

signor, once removed, J. Dalzell Brown, of any moneys paid on account of the purchase price of the lands described in the said contract of sale or for the repayment of any moneys expended by Brown in the erection of improvements upon said lands; neither is there any warrant for the statement in the brief of plaintiff in error that the nonsuit leaves in Springe's hands more than $50,000.00 in cash and improvements''. Some $20,000.00 in all was paid to Springe on account of the purchase price of the land and personal property, $8,000.00 of which was paid for the *live stock and other personal property,* which personally was received and *retained* by J. Dalzell Brown. There is *no evidence* that the *improvements erected by Brown were of any value to the defendant in error* or that they in the smallest degree increased the value of the real property referred to.

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## Statement of Facts.

We cannot wholly subscribe to the statement of facts as set forth in the brief of plaintiff in error. Briefly stated the facts are:

On September 20, 1906, one L. J. Shuman entered into a contract with the defendant in error, Heinz Springe, for the purchase and sale of certain real and personal property situate in Lake County, California (Tr. pp. 10-17). The purchase price for the real and personal property was $55,000.00, of which some $8,000.00 was for live stock and other

personalty and the remainder was for the realty (Tr. p. 13). The purchase price was payable in installments, all of which installments were paid except the final installment of $28,500.00 and interest, which became payable on September 15, 1907 (Tr. p. 13). L. J. Shuman, the vendee, on September 20, 1906, assigned his rights under the contract to J. Dalzell Brown (Tr. pp. 65, 77). Brown, on December 15, 1906, entered into possession of the land, pursuant to the contract, and erected certain improvements thereon (Tr. p. 66).

The contract of sale provides the vendor shall furnish an abstract of title to the vendee on or before December 15, 1906; the vendee is allowed 30 days after receipt of the abstract within which to examine the title; objections to the title, if any, shall be reported to the vendor in writing within said 30 days, and if not so reported are to be deemed waived; the vendor shall remove defects rendering the title unmerchantable which shall be specified by the vendee in his written report of objections (Tr. p. 12). The contract contained the *specific provision,*

> "but if said defects (excepting the securing of said patent) are not removed within a reasonable time, not to exceed 90 days after the receipt by the seller of said written report, the purchaser may, at his option, *insist upon the specific performance of the seller's agreement to sell,* extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for

> and any further sums paid on account of said purchase price" (Tr. p. 12). (The italics are ours.)

The contract further provides that the delivery to the purchaser of a good and sufficient deed and payment of the last installment of $28,500.00, the purchase price, "are concurrent conditions" (Tr. p. 13).

A written report, presenting some twenty objections to the title, was made on December 6, 1906 (Tr. p. 116).

Springe, not having removed to the satisfaction of Shuman, during the ninety days following December 6, 1906, all of the defects to the title pointed out by Shuman, Shuman notified Springe's attorney in writing that he *elected to insist upon the specific performance by the vendor,* Springe, *of his agreement to sell,* in the words following:

> "Under the option granted me I elect to insist upon the specific performance of Mr. Springe's agreement to sell." * * *
>
> Kindly advise me whether your client's declination to remove the defects specified is final. If so, I hereby give notice that I will hold Mr. Heinz Springe liable for all damages suffered or occasioned by reason of his refusal to remove the said specified defects" (Tr. pp. 126-127).

On April 16, 1907, defendant in error, Springe, notified the Shuman's attorneys that he would proceed to clear up certain of the objections made to his title (Tr. p. 128).

(NOTE: This was not a new contract by Springe, as is claimed by plaintiff in error.)

On May 7, 1907, Shuman, by his attorneys, wrote to Springe's attorneys that he waived certain objections made to the title, urging certain others (Tr. p. 129).

On June 19, 1907, Springe, by his attorney, wrote to the attorneys for Shuman advising them as to the progress made in curing the objections made to the title (Tr. p. 131).

Later there was additional correspondence between the attorneys of the vendor and vendee as to the clearing up of certain objections to the title (Tr. pp. 137-149).

On September 12, 1907, Springe had in San Francisco (for delivery to L. J. Shuman, the vendee, pursuant to his request) a deed from himself, Heinz Springe, to California Industrial Company of the property described in the contract with Shuman. At that time Springe was in Paris, France, and did not have an attorney in fact in San Francisco. On that date, J. Dalzell Brown, who had now become the assignee of Shuman, requested that Springe make out a new deed to the property *direct to himself, J. Dalzell Brown.* It was, of course, impossible for Springe at that late date to execute and acknowledge a new deed running to J. Dalzell Brown, as vendee, by the 15th of September, 1907, the date specified in the contract for the delivery of the deed and the payment of the final installment of the purchase price. So Brown, at the request of the attorney for Springe, in writing,

waived a written tender by Springe of a deed of the property to Brown on the 15th day of September, 1907 (Tr. pp. 141-142).

(NOTE: This waiver was wholly unnecessary and of *no effect* as we shall show *post.*)

It will be noted that no reference is made by Brown in his written waiver of any defects in Springe's title and there is no requirement therein that Springe's deed shall convey a "good record title" or "good merchantable title" (Tr. pp. 141-142).

(NOTE: The absence of any such requirement by Brown is most significant for, as we shall hereafter more fully point out, the vendee had previously elected to "insist upon the specific performance of Springe's agreement to sell" (Tr. p. 126); that is to say, *he had elected to pay the purchase price, demand delivery of deed from Springe and accept such title as Springe had*—and look to Springe, personally, for any damages he might suffer by reason of a defect in the title (Tr. p. 127)).

On October 29, 1907, Springe tendered a good and sufficient deed of the real property described in the contract of September 20, 1906, to J. Dalzell Brown and then and there demanded of Brown the payment of the final installment of $28,500.00 and interest then due under the contract, but Brown then refused and neglected and has ever since refused and neglected to pay said sum so due or any part thereof (Tr. p. 94).

On or about the 10th day of December, 1907, Springe, who was then residing in Paris, came to California to determine what action should be

taken by him to *enforce* the said contract of sale of September 20, 1906, and to protect the said real property therein described (Tr. p. 143).

On or about the 14th day of December, 1907, defendant Brown, executed and delivered to Central Counties Land Company, a corporation, his contract to sell to said Central Counties Land Company, 1,700 acres of the lands described in said contract of date, September 20, 1906, at and for the sum of $67,000.00 which contract bore date September 20, 1907 (Tr. pp. 77-78, 144-145).

(NOTE: The above constituted an affirmance by Brown of the contract of sale of September 20, 1906.)

On December 14, 1907, J. Dalzell Brown, executed and delivered to Central Counties Land Company a contract to sell to it the remaining 250 acres of said lands described in said contract of September 20, 1906, at and for the sum of $64,000.00 (Tr. pp. 78-79).

(NOTE: The above was another affirmance by Brown of the contract of September 20, 1906.)

On the 17th day of December, 1907, Heinz Springe again tendered a good sufficient deed of said real property to J. Dalzell Brown and then and there again demanded of said Brown the payment of the said final installment of the purchase price under said contract of September 20, 1906, but Brown then and there again refused and ever since has refused to pay said sum, or any part thereof (Tr. p. 95).

On January 16, 1908, Heinz Springe demanded possession of the real property described in the contract of September 20, 1906, from J. Dalzell Brown, he then being in possession of said real property, but Brown again refused and neglected to deliver up the possession of said property (Tr. p. 95).

Thereafter, on the 16th day of January, 1908, at the County of Lake, State of California, defendant in error, Heinz Springe, brought an action in ejectment against said J. Dalzell Brown, in the Superior Court of the said County of Lake, State of California, said action being entitled, *"In the Superior County of the State of California, in and for the County of Lake, Heinz Springe, plaintiff, vs. J. Dalzell Brown et al., defendants, and being Superior Court No. 1789"* (Tr. pp. 146, 160).

Thereafter J. Dalzell Brown appeared in said action in ejectment by his attorney, Edward O. Allen, and filed his verified answer therein (Tr. p. 64), which answer is more fully referred to *post.*

Thereafter Central Counties Land Company, having obtained permission so to do, filed in said action in ejectment, its complaint in intervention, which is more fully referred to *post.*

Thereafter on the 25th day of May, 1908, the action in ejectment came on for trial, all parties appearing therein by their attorneys of record, and said cause having been tried before the Court, the Court having considered the law and the evidence,

submitted and filed findings of fact and conclusions of law and rendered its judgment therein in favor of the plaintiff, Heinz Springe and against the defendants, J. Dalzell Brown and Central Counties Land Company (Tr. pp. 91-100-150).

Said judgment in the action of ejectment was duly given and made against the defendants therein named, including the defendant, J. Dalzell Brown. That said judgment has not been set aside, modified or reversed and no appeal has been taken therefrom and that the same remains in full force and effect (Tr. p. 150).

Thereafter, on or about the 28th day of May, 1908, J. Dalzell Brown, in consideration of the sum of ten ($10.00) dollars assigned to Edward O. Allen, his attorney, in the ejectment suit, all his right, title and interest under the agreement of date September 20, 1906, between Heinz Springe and Shuman (Tr. p. 148).

Thereafter on the 4th day of June, 1908, Central Counties Land Company, surrendered possession to Heinz Springe of his lands described in the contract of September 20, 1906, "in pursuance of the judgment recently rendered in ejectment suit" (Tr. pp. 151-152).

Thereafter, on or about the 24th day of April, 1913, Edward O. Allen, in consideration of the sum of $1.00 to him in hand paid, sold, assigned and transferred to Power and Irrigation Company of Clear Lake, an Arizona corporation, the plaintiff

in error herein, the assignment made to him by J. Dalzell Brown of any and all rights accruing or to accrue thereunder (Tr. p. 149).

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## I.

### THE RIGHTS OF THE PARTIES AS ESTABLISHED BY THE FOREGOING FACTS, CONSIDERED APART FROM THE QUESTION OF RES ADJUDICATA.

We cannot agree with plaintiff in error's statement of the reciprocal rights of Springe and of Brown under the contract between Springe and Shuman of date September 20, 1906, which rights and duties, as we see them are as follows:

*Brown's Rights and Duties:*

(a) Assuming that the vendee, Shuman, had pointed out in his written objections certain defects in Springe's title which Springe was unable to remove within the 90 days specified in the contract, he, Shuman, had the option to:

(*a*) "Insist upon the specific performance of the seller's agreement to sell; or

(*b*) "Extend the time for the removal of said defects"; or

(*c*) "Declare the agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for and other sums paid on account of said purchase price" (Tr., p. 12).

Brown, or rather his assignee, Shuman, elected to "insist upon the specific performance of the seller's agreement to sell" (Tr. pp. 124-125).

Shuman also at the same time notified Springe that he would also insist upon Springe removing the objections to the title which had been pointed out by him and which rendered Springe's title unmerchantable, failing which "I will hold Mr. Heinz Springe liable for all damage suffered or occasioned by reason of his refusal to remove the said specified defects" (Tr. p. 127).

From the foregoing, it appears that L. J. Shuman, the vendee under the contract, prior to the time that he assigned his rights under the contract to J. Dalzell Brown, had elected to purchase the property described in the contract of September 20, 1906, and to take such title as Springe was able to give; but with the proviso that in the event Springe should not remove the defects in the title pointed out that *he, Shuman, would hold Springe liable for damages suffered or occasioned by his refusal to remove such specified defects.*

Shuman (and his assignee Brown), having made such election on March 18, 1907, was thereafter required to pay the purchase price upon tender of a deed sufficient in *form* by Springe, conveying such title as Springe had, failing to do which he would be in default under the contract, not only by the specific terms thereof, but as a matter of law, and would forfeit all rights under the contract including all moneys paid on account of the con-

tract price or laid out or expended on the land.

> "Where an objection to the title is known to the purchaser, he is bound to take a stand when his first payment falls due. His subsequent retention of possession and exercise of acts of ownership over the property prevent his recovery of his payment for such defective title."
>
> *Caswell v. Black River C. N. W. Mfg. Co.,* 14 John N. Y. 1817-453;
>
> *Bennett v. Hickey,* 112 Mich. 379;
>
> *Corbett v. Schultz,* 119 Mich. 249; 77 N. W. 947.

> "Failure of merchantable title in vendor at time of entering into contract, was no justification for default of vendee in making payment."
>
> *Barrows v. Harter,* 165 Cal. 45.

The extention of time by Shuman to Springe for the curing of defects in Springe's title, while *inconsistent* with rescission, was *consistent* with specific performance; and the only course open to Shuman's assignee, Brown, for Springe's failure to cure defects within the extended time was to accept such title as Springe had, pay the purchase price upon tender of the deed and then bring a *suit to recover damages,* if any, suffered by reason of any defect in Springe's title.

Brown could not resist Springe's demand for the purchase price because of any defect in title, nor his demand for possession, in case of Brown's default in payment. Brown, therefore, by way of

cross-complaint, might have set up in the action of ejectment, his rights, if any he had, for damages suffered by reason of any defects in Springe's title; provided, of course, he had at the same time tendered in court, the purchase price due. In such event, the Court could grant any relief proper in equity.

*Belger v. Sanchez,* 137 Cal. 615.

But, as appears from the copy of the complaint in equity, marked Exhibit "E" to Brown's answer to the complaint in ejectment (Tr., p. 80), he, Brown, *was unable to tender payment,* and he had no equitable defense; and so he plead the flimzy defense that the tender was on a holiday and therefore he was not in default—a false defense, to be sure, as the Court found, but the only one he had.

Brown, even if he had *not* elected to require Springe to convey, notwithstanding certain alleged defects in the record title, could not, after tender of deed, rescind the contract *because of defects in* the *title* without *promptly* surrendering possession of the property. This he wholly failed to do.

Where the purchaser has remained in possession, treating the property as his own, and the contract in all respects as though it were binding and a subsisting contract, any defects in title or misrepresentations as to title are waived and he cannot recover back his payments.

*Cross v. Mayo,* 167 Cal. 604.

If the party entitled fails to rescind promptly he will be held to have waived his right to rescind.

*Cross v. Mayo, supra;*
*Civil Code,* § 1691;
*2 Pomeroy on Equity,* § 817; § 879.

It is of the essence of the right to rescind that prompt notice shall be given of the demand, and that the action shall be timely brought.

*Evans v. Duke,* 140 Cal. 26.

Neither was Brown permitted to effect a rescission of the contract (as is now claimed by his assignee) by "voluntarily surrendering the possession of the premises" to Springe after judgment in ejectment.

As was said in the case of *Glock v. Howard & Wilson Colony Co.,* 123 Cal. 14, viz.:

> "It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee without risk could speculate indefinitely in the land of the unfortunate vendor. The vendee would enter into a contract in which time would be declared of the essence, and stipulate under condition precedent, as in this case, to make payment at a certain time. Failing to make payment he would three months, six months, one year, or as in this case over three years, after the date of the failure, make an offer to perform, and if the land had risen in value, according to the theory of respondents here, could compel performance; but in every case he could recover the moneys paid."

The same rule, of course, would apply as to surrendering possession of the property after judgment, as it would where the vendee was merely in default. His status having been fixed as being in default, any act of the vendee thereafter could not, of course, restore his right under the contract.

The plaintiff in error in this action, successor in interest of Brown, would attempt to escape from the force of the foregoing decision by claiming that tender of the deed not having been made upon the date named in the contract, that the provision that time was of the essence of the contract was waived, and that time could not again be made of the essence of the contract so far as the payment to the vendee was concerned, until after reasonable notice served by the vendor upon the vendee of his intention to make time of the essence. This contention is without force.

In *Newton v. Hull,* 90 Cal. 491, the Court says:

> "It is contended for appellant that because it does not appear that plaintiff tendered to defendants a deed of the land on the first day of November, 1888, when the third and last installment of the purchase-money became due, she was in default equally with the defendants; that 'time being of the essence of the contract,' the deed must have been tendered 'at the time agreed upon, and at no other time'; and that by the mutual default of both parties 'the contract came to an end, and cannot be enforced by either party.' "
>
> * * * * * *
>
> "Undoubtedly, time is of the essence of the contract under consideration, so far as it is

expressed or implied that it should be so. It is expressly of the essence of the agreement on the part of the defendants to pay the last two installments of the purchase-money, and as to which they were put in default by the plaintiff's tender of a deed and demand of payment on the seventh day of February, 1889, three months after the last installment became due; but as to the agreement on the part of the plaintiff to convey the land 'on receiving such payment,' there was no default whatever, as there was no tender of payment by the defendants, or either of them." * * * "But the stipulation that time is of the essence of the contract seems to be applicable only to the agreement on the part of the defendants to pay the purchase-money, and to be intended for the benefit of the plaintiff alone." * * * "There is no provision in the agreement that the plaintiff should forfeit her right to the purchase-money in case the defendants should fail to pay it on or before the day on which it became due, nor in case she failed to tender a deed on that day, or at any time before the defendants tendered payment of the purchase-money. Nor was she bound to tender a deed, except upon tender of payment of the purchase-money." * * * "As we have seen, she could not be put in default, even after the purchase money was overdue, except by her refusal to convey *upon tender of the purchase-money.* She was therefore entitled, upon tendering the deed, to demand payment of the purchase-money on the seventh day of February, 1889, as she did, and upon defendants' refusal to pay, to bring this action."

*Newton v. Hull,* 90 Cal. 491, 493, 494.

See also,

*Bradford v. Parkhurst,* 96 Cal. 105;

**Haile v. Smith,* 113 Cal. 656.

(b) The waiver by Brown of the tender by Springe of a deed on September 15, 1907, was wholly immaterial and unnecessary.

For Brown, being in possession of Springe's land, pursuant to the contract, he waived all defects in title and all right to demand delivery of the deed, so long as he remained in possession of the property.

*Cross v. Mayo,* 167 Cal. 594.

(c) On tender of the deed by Springe to Brown on October 29, 1907 (and also on December 17, 1907), Brown *and his predecessor, Shuman, having elected to insist upon the specific performance of the contract*—it was his duty to pay the amount then remaining due under the contract, together with the interest, and receive such title as Springe was able to give and to be "content with the personal responsibility of the vendors, Springe, upon his conveyance," to "convey a merchantable title."

In *Gates v. McLean,* the Court says:

> "* * * In the latter case, it is considered that he is willing to receive such title as the vendor is able to give and *he is content with the personal responsibility of the vendor upon his conveyance.*"
>
> *Gates v. McLean,* 70 Cal. 42.

In *Haile v. Smith,* 128 Cal. 415, the Court says:

> "In Worley v. Nethercott, 91 Cal. 512, 25 Am. St. Rep. 209—we quote from the syllabus, which is a correct summary of the decision—the law upon this point is stated as follows: 'A purchaser of land in possession thereof un-

der a contract of sale, by the terms of which the vendor is to give a warranty deed of the property conveying a good and perfect title thereto, cannot, upon the tender retain both the land and the purchase money until a vendor's failure and inability to convey a good and perfect title shall be offered him, but he must pay the purchase price according to the contract, and receive such title as the vendor is able to give if he chooses to retain the possession of the land, or he may rescind the contract, restore the possession to the vendor, and recover the purchase money paid, together with the value of his improvements, after deducting therefrom the fair rental value of the premises; and if he fails and refuses to adopt either course, he is liable to an action of ejectment by the vendor.' "

This doctrine is approved in *Gervaise v. Brookins,* 156 Cal. 108, and cases cited.

In *Gervaise v. Brookins,* the Court says:

"This doctrine disposes of the case. Brookins is estopped from denying the title of Book while he retains the possession which he obtained from Book, in pursuance of the contract of sale. Hence, he cannot set up the want of title as an excuse for non-performance on his part. The proffered defense to the action for possession, founded on the failure and inability of the vendor's successor in interest to comply with Brookins' demand for a good title, must be disregarded because of the fact that he received his possession from Book, from whose successor he would now withhold it. His retention of the possession thus received binds him to pay the price and accept the vendor's title, *such as it is.*"

*Gervaise v. Brookins,* 156 Cal. 108.

(d) Brown, who was the assignee of Shuman, and having acquired Shuman's rights under the contract, on the 20th day of September, 1906, which *was subsequent to the date when Shuman elected to insist upon the specific performance* by Springe of the contract *and to look to Springe personally for any damages* which he might suffer in the event Springe should fail to convey to him a "merchantable title," *was bound by such election by Shuman,* and *was,* therefore, *bound to accept such title as Springe had,* and Brown having remained in possession of the property after notice and knowledge of any defects in Springe's title and having refused to surrender possession of the property to Springe, upon demand made by Springe therefor and tender of a deed good and sufficient in form, Brown waived any right which he at any time might have had to rescind the contract.

*Cross v. Mayo,* 167 Cal. 595.

In *Cross v. Mayo,* the Court says:

> "It is unnecessary to cite authorities in support of the well settled proposition that a prompt disaffirmance of a contract by one entitled to rescind, upon discovery of the facts entitling him to rescind is essential, and that if he fails to rescind promptly, and to the contrary, continues to treat the contract as binding, he will be held to have waived his right to rescind and to have elected to affirm the contract. As it is stated in our Civil Code, 'he must rescind promptly, upon discovering the facts which entitle him to rescind.' (Section 1691): 'It is of the essence of the right to rescission that prompt notice shall be given of

the demand, and that the action shall be timely brought. Upon obtaining knowledge of the facts entitling him to rescind, plaintiff should commence the proceedings for relief as soon as reasonably possible.' 'Acquiescence consisting of unnecessary delay after such knowledge will defeat the equitable relief.' (2 Pomeroy's Equity Jurisprudence, sec. 817). 'He is not allowed to go on and derive all possible benefits from the transaction and then claim to be relieved from his own obligations by rescission or refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself in reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations.' (2 Pomeroy's Equity Jurisprudence, sec. 897.) It would seem to be unnecessary to multiply citations upon this principle of law so fundamental and so well settled.' Whether the party entitled to rescind has acted promptly is a question to be decided by the trial court upon the facts of the particular case. The evidence in this case was of such a nature as to support a conclusion that the defendant with full knowledge of the facts, was not ready to end the contract, and that, continuing to treat the same for his own purpose as valid and binding, he failed to make known any desire to terminate the contract for such a length of time and under such circumstances as to preclude the exercise by him of any right of rescission. (See, also, *Kornblum v. Arthurs,* 154 Cal. 246; (97 Pac. 420); *Marten v. Burns W. Co.,* 99 Cal. 357; (33 Pac. 1107); *Bailey v. Fox,* 78 Cal. 396, (20 Pac. 868).)"

*Cross v. Mayo,* 167 Cal., p. 594, quoting from pp. 604-605, and cases cited.

The above rule applies with a special force to the right of J. Dalzell Brown to rescind the contract of sale by reason of any defects in Springe's title; for it will be remembered that Brown, with full knowledge of the alleged defects in Springe's title, entered into possession of Springe's lands and erected costly improvements thereon; he paid several installments on the purchase price, and entered into contracts with Central Counties Land Company to sell the same lands to it at a greatly enhanced price; he refused to surrender possession upon tender of a deed by Springe sufficient in form and he made no objections to the tender of the deed; he refused to surrender possession of the property after refusal to pay the purchase price; and in the action of ejectment he denied Springe's title to the property, also his right of possession of the property and claimed ownership and right of possession in himself and his assignors, as vendees under Springe's contract; he also asserted title and right of possession under the contract, and alleged that he was not in default under the contract.

1. *Springe's Rights and Duties:*

(a) The final payment on the purchase price, under the contract, became due September 15, 1907, and the vendee, Shuman (and his assignee, Brown) having elected to take conveyance of such title as Springe had (Tr., pp. 125-126), Springe, upon tender to Brown on or after September 15, 1907, of a

deed sufficient in form, was entitled to demand and receive the final payment due under the contract, and in the event Brown should fail to make such payment, he had the right to declare Brown's rights under the contract forfeited, recover possession of his land, and retain any moneys paid on the contract price.

In *Skookum Oil Co. v. Thomas,* 162 Cal. 544, the Court said:

> "It seems to us that the principles so clearly presented in Glock v. Howard & Wilson Colony Co., 123 Cal. 1, ( * * *) are determinative of the questions here involved. It was there held that under a contract for the sale of real estate, in which time is made of the essence of the contract and performance by the vendee is made a condition precedent to a conveyance and upon breach thereof he is declared to forfeit all rights thereunder, including payments made thereon, the vendee cannot, after his default, without excuse shown therefor, by a tender of the amount due, acquire either an equitable or a legal right to maintain an action to recover back the moneys paid under the contract, nor can the purchaser, in such case, put the vendor in default by mere tender; nor can he elect to consider the contract at an end, and recover what he had paid on the contract, when the vendor has not abandoned the contract, but stands upon its terms and conditions, * * * the vendor's right to retain the purchase money, where default was unexcused, is independent of any express clauses in the contract for forfeiture of rights, or for the retention of the purchase money as liquidated damages, and that such express clauses are declarations in express terms of the

legal rights of the parties under such a contract, existing without them."

*Skookum Oil Co. v. Thomas,* 162 Cal. 544-545.

See

*Glock v. Howard, et al.,* 123 Cal. 1.

(b) If it be true (*which we deny*) as is claimed by plaintiff in error, that Springe waived the payment by Brown of the final payment under the contract on September 15, 1907 (Tr. pp. 140-142), still, by tendering a deed to Brown and demanding the final payment of the purchase price, Springe had the right to declare a forfeiture of all of Brown's rights under the contract, in the event Brown failed to pay *upon such tender and demand made* (*Newton v. Hull,* 90 Cal. 487).

All this was done by Springe. On December 17, 1907, he tendered a deed and demanded payment (Tr. p. 173). After tendering the deed on December 17, 1907, Springe made two demands upon Brown for surrender of the property but Brown refused to deliver. After that the ejectment suit was brought (Tr. p. 60). What more or greater notice could be required, in order to put Brown in default? Neither Brown nor *any of his numerous assignees,* even to this day, *has ever tendered the final payment to Springe.* Brown, in his answer in the ejectment suit, admitted the payment was due, and that tender of the deed was made, but plead that the tender was not sufficient because, *as he said,* it was made on a holiday (Tr. p. 67).

*That allegation, of course, was not true, as was determined by the Court in the ejectment suit.*

But it is not true that Springe ever extended the time of the payment of the final installment of the purchase price. Brown, the vendee, waived the tender of the deed on the day the final payment became due. But time was not of the essence of the contract *as to the time of the tender of the deed,* but *only as to the payment of the purchase price.* Springe was, therefore, entitled upon tendering the deed to demand payment of the purchase price and upon Brown's refusal to bring action.

*Newton v. Hull,* 90 Cal. 491.

There was no *act of forfeiture* required of Springe to put Brown in default. Under the terms of the contract the forfeiture of Brown was automatic. The language of the contract is as follows:

> "But if the sale herein provided is not consummated under the terms and conditions of this agreement, by reason of the failure of the purchaser to pay the balance of the purchase price when due, as herein provided, then the sums of money paid the seller on account of the purchase price, and interest thereon, shall be forfeited and retained by the seller as liquidated damages, and the seller shall be thereafter released from all future obligation in law and equity to convey said lands, and may, at once, take possession thereof and re-enter the same."

(c) If it be contended that the time for payment by Brown under the Shuman contract was extended by reason of the letter of September 12,

1907, from Brown to Springe, then it was only extended until Springe, by "all due diligence" should deliver a deed "upon payment of the balance of the purchase price" (Tr. pp. 140-141), that is, until Springe notified Mr. Brown that he was ready to deliver the deed, or, if you please, until the tender of the deed to Brown on December 17, 1907. It is not asserted or claimed in this suit that Mr. Springe failed to produce said deed with all due diligence. It therefore must be admitted that he did so.

But we deny that there was any agreement for the extension of the time within which Brown was authorized to make the payment under the contract. It was wholly proper and natural on the part of Springe's attorney, Mr. Levy, when Brown stated that he did not now want the deed to run to California Industrial Company but to himself direct, to say that "your contract provides that the payment is due on September 15, 1907. We cannot produce a new deed by that time, but in the event you insist upon a production of the new deed (which, by the terms of the contract, must be delivered simultaneously with the payment) you must waive that provision in the contract which requires us to make the tender simultaneously with the payment on September 15, 1907. You must give us a reasonable time within which to send back a new form of deed and have it executed and returned to you." And in response to that request Mr. Brown did waive, on his part, *that provision in the*

*contract which required the deed by Springe to be delivered simultaneously with the payment of the money.*

There is no proof whatever here that Mr. Springe ever waived the payment by Brown of the final installment on September 15, 1907, or the forfeiture of Brown's rights by reason of the failure to make such payment.

It is true that on December 17, 1907, as soon as the new deed was returned, Springe made a tender of it to Brown pursuant to the terms of Brown's letter, and the only effect of the tender of that deed was to establish beyond question any doubt as to whether or not Springe, by reason of accepting said letter from Brown, had agreed to the extension of the time of payment by Brown until such new deed could be executed and tendered. By making such tender Brown immediately became in default.

Under no theory, under the facts as offered by the plaintiff in error in this case, does it appear that there was any waiver that time was of the essence of the contract.

The theory of the learned counsel seems to be that it was the duty of Springe, under the Shuman contract, to tender a deed in order to put Brown in default. We submit that that was not the case at all. There was no requirement under the contract, or under the letter of September 12, 1907, for Springe to ever make any tender of a deed. All he was required to do was to "*with all due dili-*

*gence cause to be delivered to me, upon payment of the balance of the purchase price due, a proper deed conveying the property under consideration to myself.''* In other words, Brown was required to make the payment on September 15, 1907, or be in default, or, at any rate, would be in default at the expiration of the time, however soon that time should be, when Springe should notify Brown that he had the deed ready for delivery upon payment of the money. As above stated, there was no requirement under the contract or in the letter that it was necessary for Springe to make a tender of the deed.

*Newton v. Hull,* 90 Cal. 487.

On the other hand, if it should be assumed that Brown had forfeited all his rights under the Shuman contract by failure to make payment on September 15, 1907, the tender of the deed by Springe to Brown on September 17, 1907, had no other or greater effect than that of an entirely new and independent offer to convey the property to Brown upon the payment of the amount specified in the demand at that time made, and Brown failing to make such payment, it merely remained an unaccepted offer and of no validity or consequence whatever. It did not, for the purpose of this nonsuit, constitute a waiver by Springe of the prior forfeiture by Brown.

## II.

### THE NON-SUIT WAS PROPERLY GRANTED.

The motion for non-suit was made upon ten separate grounds as shown in the transcript (Tr. pp. 174-175). In his opinion, however, Judge Van Fleet considered but one, the eighth ground (Tr. p. 176), it appearing clear to him that the principal ground discussed was well taken and that any discussion of the other grounds was unnecessary. Of course, if it should appear to this Court that the non-suit was properly granted upon *any ground* assigned, the judgment must be affirmed.

1. *The Judgment in Ejectment Was a Bar.*

We will pass at once to a discussion of the eighth ground urged by the defendant in error on its motion for non-suit which was the one considered by Judge Van Fleet.

(a) It can very easily be shown, conclusively, that the precise issue sought to be litigated and determined in this action, to wit: whether or not

(1) Heinz Springe, the defendant in error, and vendor under the contract of sale, of September 20, 1906, was in default under said contract of sale;

(2) J. Dalzell Brown, the assignor once removed of the plaintiff in error, and assignee of the vendee under said contract of September 20, 1906, was in default under said contract of sale;

(3) Said contract of September 20, 1906, was rescinded by mutual consent of the parties; or

(4) Said contract of September 20, 1906, was rescinded by J. Dalzell Brown.

The complaint in this action was in the usual form of a complaint in ejectment (Tr. p. 60). Plaintiff therein, Heinz Springe, who is the defendant in error here, alleged in his complaint his ownership in certain real property described; that on a date named he was in possession thereof; that on said date the defendants, including J. Dalzell Brown, entered into possession and ousted the plaintiff; that the plaintiff on said date and ever since then had been lawfully entitled to the possession of the said real property; but that the defendants have ever since said date unlawfully withheld from the plaintiff the possession thereof, to plaintiff's damage, etc. The complaint ends with a prayer for possession of the property described in the complaint, and for the damages for withholding of it.

The defendant, J. Dalzell Brown, in his answer to the complaint in ejectment;

(1) Denies that the plaintiff, Springe, on the date named in the complaint, or at any time since then, was the owner or seized in fee of the real property described in the complaint;

(2) Denies that the plaintiff had been in possession of the real property, as alleged in the complaint, or that the defendant has ousted the plaintiff;

(3) Denies that the plaintiff, at the date named in the complaint, or at any time since then, was entitled to the possession of the real property;

(4) Admitted that the defendants had withheld from plaintiff the possession of the property; but

(5) Denies that such withholding was unlawful.

For his affirmative defense, defendant Brown alleged:

(6) The execution of the contract of sale of date September 20, 1906, by Heinz Springe, vendor, to L. J. Shuman, vendee (setting out a copy of it);

(7) The assignment by Shuman of all his right in said contract to the defendant Brown.

(8) The granting by Brown on the 20th day of September, 1907, of an option to Central Counties Land Company to purchase 1,700 acres of land described in the contract of sale of date September 20, 1906, for the sum of $68,000;

(9) The granting by Brown on the 14th day of December, 1907, of a second option to Central Counties Land Company to purchase the remaining 250 acres of land described in said contract of September 20, 1906, for the sum of $65,000;

(10) That on the 1st day of February, 1908, Brown had let Central Counties Land Company into the possession of all of the lands described in the complaint, and that said company had ever since been in full possession of said lands, and was holding the same, and claims the right to hold the

same by virtue of the above mentioned contracts;

(11) That since entering into possession of said property he, Brown, had erected extensive improvements thereon, of the reasonable value of $40,000.00;

(12) That he, Brown, had paid Springe all installments of the purchase price as provided in the contract of date September 20, 1906 (a copy of which marked Exhibit "A" was appended to the answer and made a part thereof), except the last installment thereof, to wit: $28,500.00, and interest thereon at the rate of 6½% from June 15, 1907, "and said last installment and interest are now due and payable to plaintiff".

(13) "That on the 18th day of December, 1907, plaintiff (Springe) tendered to defendant a document purporting to be a deed conveying said property to defendant, and at the same time demanded the above mentioned sum of $28,500 and interest. That said 18th day of December, 1907, was a legal holiday, and that no further tender of a deed conveying title to the said property has been made by plaintiff to defendant; and defendant is informed and believes, and on that ground alleges that no such tender has been made to anyone else."

(14) That Central Counties Land Company is a necessary party to the action, and that a complete determination of the action cannot be had without bringing in said company.

(15) "That said Central Counties Land Company has brought a suit in equity against the plaintiff Springe and defendant Brown for a determination of its rights to the above mentioned property * * * and that said suit

will more fully determine the same cause of action and the rights of the parties hereto as are the subject of the action herein."

(16) The defendant then prays that the Central Counties Land Company be made a party; that the action of ejectment be abated, and that the defendant be dismissed with his costs, etc.

Attached to the answer of the defendant Brown, and made a part thereof, were the following exhibits:

Exhibit "A" was the contract of date September 20, 1906, which is the Exhibit "A" to the complaint in this action.

Exhibit "B" is the assignment by Shuman, the vendee, under the contract of September 20, 1906, to Brown, of all his rights under that contract.

Exhibit "C" is the option which Brown gave to Central Counties Land Company to purchase 1,700 acres of the lands described in the contract of September 20, 1906.

Exhibit "D" is another option given by Brown to Central Counties Land Company to purchase the remaining 250 acres of the lands described in the contract of September 20, 1906.

Exhibit "E" is a copy of the complaint in equity of the Central Counties Land Company against Brown and Springe, and the substance of which, as it was introduced by plaintiff in error as a part of his case, ought to be stated to this Court. That complaints sets out substantially all of the matters

set forth in the answer of the defendant, Brown, in the action of ejectment, also the following:

> (a) "That on the 23rd day of September, 1907, the plaintiff tendered to defendant, Brown, in the city and county of San Francisco, State of California, by its secretary, Edward O. Allen, thereunto duly authorized, a written offer of performance of the above mentioned contracts of September 20, 1907, and December 14, 1907, respectively.
>
> That then and there defendant Brown stated that he could not deliver to plaintiff the deed conveying a good title to the above described property, for the reason that he had not yet received a conveyance of said property from defendant Springe.
>
> Plaintiff furthermore is informed and believes, and on that ground alleges that defendant Brown has not received a conveyance of the said property from defendant Springe for the reason that the defendant Brown does not possess sufficient funds to pay the amount due said Springe under the first above-mentioned contract of sale" (Tr. pp. 83 and 84).

(b) An allegation is made to the effect that plaintiff is able to carry out its obligations under the option contracts given to it by Brown.

(c) The prayer of the complaint was to the effect that Central Counties Land Company be substituted for all the interests of defendant Brown in the property, and that the defendant Springe be required to convey to plaintiff the property in question, upon payment of the amount due him under the original contract of sale, etc.

Central Counties Land Company appeared in the action of ejectment and requested permission to file therein a complaint in intervention, which permission was granted and a complaint was filed. In its complaint in intervention it alleged by reference practically all of the allegations set forth in its said complaint in the suit in equity above referred to, and the said other exhibits attached to the said answer of Brown in said action of ejectment.

It also alleged that Albert B. Southard and John A. Black were necessary parties to the action. In its prayer it asks that the said Albert B. Southard and John A. Black be made parties to the action, that an amended complaint be served on them, and that it, Central Counties Land Company, be permitted to plead to said complaint.

All of the parties appearing in the action of ejectment appeared at the trial, by their attorneys of record (Charles S. Wheeler, attorney for plaintiff in error here appearing by J. B. Kennedy, Esq. for Central Counties Land Company). Up to the time of the trial, and until after entering judgment, all of the defendants and intervenors appearing in said action urged their defenses to the complaint therein. The court made findings of fact and gave judgment as set forth on pages 91 to 99 of the record.

2. Under the California practice, a judgment is embodied in a judgment roll.

C. C. P., § 670.

The papers constituting the judgment roll, where there has been a trial, include the pleadings, the findings of the Court and the judgment (Subd. 2). In the instant case the plaintiff in error introduced the findings of fact and conclusions of law in the case of *Springe v. Brown* (Tr. p. 91). From those findings it appeared that the Court expressly found against the assignor of the plaintiff in error everything which Brown tendered in his answer in that case including the precise issue which the plaintiff in error seeks to litigate in this case.

It found, for example, in Finding I that the plaintiff, Springe, was the owner of the property.

In Finding II, that on the 20th day of September, 1906, while Springe was the owner of the property, he executed the contract referred to in the answer of Brown in that case, marked Exhibit "A" and annexed to the answer.

It found in Finding III that the vendee, Shuman, made a contract with the defendant Brown, which is set forth as Exhibit "B" to Brown's answer. And in Finding IV that on December 14, 1907, Brown delivered to the Central Counties Land Company two contracts, referred to and marked Exhibits "C" and "D" to the answer of Brown; and found in Finding V that from the 15th day of December, 1906, to and until the 1st day of February, 1908, the defendant, Brown, was in possession of the real property under the con-

tracts referred to; and in Finding VI, that on the 1st day of February, 1908, he surrendered possession to the Central Counties Land Company, the intervenor therein, which took possession of said property and which has ever since been and now is in possession of it, claiming to hold the same by virtue of the contract, Exhibit "A", and the other contracts referred to.

In Finding VII it found that neither Brown nor the Central Counties Land Company had ever paid or offered to pay or tendered to the plaintiff, Springe, the last installment which fell due under the terms of said Shuman contract and that *they have wholly failed, neglected and refused to pay said last installment.*

It expressly found in Finding VIII that on the 29th day of October, 1907, Springe tendered a *good and sufficient deed of the property to Brown* and demanded payment of the balance due from him *and that Brown then refused and neglected and has ever since refused and neglected and still refuses and neglects to pay said amount.*

It found in Finding IX that on the 17th day of December, 1907, plaintiff, Springe, *tendered a good and sufficient deed of the property to J. Dalzell Brown* and demanded payment of him of the balance then due, which Brown then refused and still refuses to pay.

It found that on the 16th day of January, 1908, plaintiff, Springe, demanded possession of the

premises of *Brown, who was then in possession of the property, by his agent, and who refused to deliver it.*

As conclusions of law from these facts the Court found that the plaintiff was and still is the owner of the property and is entitled to the possession of said real property and the whole thereof, and second, that Central Counties Land Company, intervenor herein, is not entitled to any relief. The judgment in conformity with these conclusions of law was entered.

It seems to us too plain for argument that the identical issues involved in this case were expressly determined by the court against the contentions of the assignor of plaintiff in error in that case, and that for the plaintiff in error to attempt to maintain the position which he takes in this case is simply to attempt to relitigate the matters which were expressly adjudged against him in the former suit.

It should be remembered that the Central Counties Land Company was expressly averred by the defendant, Brown, in that case to be a necessary party to that action, and the various contracts which the defendant, Brown, had made with the Central Counties Land Company were set up in Brown's answer together with the suit which the Central Counties Land Company had instituted against both Brown and Springe (Tr. pp. 66-68).

It was also alleged by Brown that he let said Central Counties Land Company into the property and that it was now holding the same pursuant to these contracts—being the contracts between Brown and Central Counties Land Company, and which are set forth as Exhibits "A", "B", "C" and "D" to his answer on pages 69 to 79 of the record.

Every claim, legal and equitable, of Springe, Brown, the Central Counties Land Company, and every other party, was presented to and laid before the Court in that case and its judgment prayed thereon. *It found* not only *by direct implication,* but by *specific adjudication* everything against Brown and the Central Counties Land Company, and it is too plain for argument that its determination upon that point is conclusive upon the parties and their privies in every other tribunal.

The cases cited by counsel, upon which he relies, —*Haile v. Smith,* 128 Cal. 415, and *Heilig v. Parlin,* 134 Cal. 99,— are easily distinguishable from the case at bar and when properly understood are fully in accord with the ruling of the Court below.

The first case,—*Haile v. Smith,*—is an authority against the plaintiff in error upon another point, but it has no bearing upon the question of estoppel by judgment nor was the question which is here involved decided or even discussed in it. That was an action of ejectment and the question before

the Court was whether or not a vendee who was in possession of the property under a contract from his vendor could aver, in an action by the vendor against him to recover possession of the property, that the vendor had not a good and complete title to the land and therefore could not maintain the action. As the Court says, referring to the vendee, page 418:

> "His position really is that, under his view of the facts, he may indefinitely keep possession of the land while refusing to make payment of the purchase money. But this he cannot do. He received possession of the land from respondent under the contract, and can retain possession only by fulfilling his covenants which he therein made. He cannot keep both the land and the purchase money. It is not necessary, therefore, for the purposes of this case, to determine definitely whether or not respondent has a good and sufficient title. If appellant desired to retain the possession which he acquired under the contract he should have complied with his part of it; if he concluded not to comply because the title was not satisfactory to him, he was bound to restore possession to respondent. Whatever cause of action he may have for the purchase money which he paid and for the value of his improvements is another matter; it constitutes no defense to the present action."

This case decides simply, of course, that the vendee can not refuse to surrender possession of the property upon the ground that the vendor has not title,—obviously a correct conclusion. And it was in connection with the claim that the vendor, in fact had *no title* to give to the vendee,—that the

Court uses the language that whatever cause of action he may have for the purchase money and for the value of the improvements was another matter,—meaning, of course, that so long as he remains in possession of the property he could not dispute the title of his vendor.

The second case, *Heilig v. Parlin,* 134 Cal. 99, is not in conflict with the foregoing. In that case the vendee, under a contract of sale, failed to make a payment which was due on February 2, 1895. The vendor then on February 10th, eight days thereafter, served a notice in writing in which,—

(a) He demanded a surrender of the possession of the land; and

(b) Notified the vendee that the contract "was absolutely abandoned and determined because of the failure to make said payment."

Soon thereafter the vendor took possession of the land, apparently by force, and thereafter and on March 19, 1895, he commenced an action in the Superior Court to quiet title to the land. In this action the defendant answered and filed a cross-complaint in which he set out the contract between the vendor and the vendee and alleged due performance up to the date of the ouster and prayed judgment on the cross-complaint for the amount of the purchase money paid and expended under the contract. The plaintiff's general demurrer to this cross-complaint was sustained and the de-

fendant thereupon, declining to amend, his default was taken and judgment was entered in favor of the plaintiff, quieting the title to the land.

The question presented was whether or not this judgment was an estoppel in a subsequent action to recover the moneys paid on the contract as moneys laid, paid out and expended, and it was held that this judgment was not an estoppel. The reason is not far to seek.

In the first place, it appears that the plaintiff in bringing his suit to quiet title was not standing on the contract. He had, in fact, *rescinded* the contract; for it appears that he notified the other party prior thereto that the *contract was "abandoned and determined"*. He was entitled to the possession of the property, therefore, not because of the failure to make payment under the contract, but because the contract of sale was terminated and *rescinded.* This termination and *rescission* which it will be observed took place before the suit, gave rise, of course, to a claim in favor of the other party for his moneys which he had paid under the contract. But this claim could not properly be set up in the suit to quiet title.

In the second place, it was an admitted fact in the pleadings in *Heilig v. Parlin* that the contract referred to had been *rescinded;* and of course, in that event, the party was entitled to recover his money back. In this regard the Court says:

> "In the present case, however, the complaint directly alleges a rescission on the part of the

> vendor, Parlin, *and this allegation is not denied in the answer.*"

In the case at bar the rescission of the contract is expressly *denied* and it was in fact expressly disproved on the trial; for Springe did not rescind the contract with Brown, he affirmed it and alleged a breach of it by Brown.

In the third place, as the Court notes:

> "The cross-complaint in the action to quiet title did not aver that the contract, in reference to which the money had been paid and expended, had been rescinded. It may have been for that reason that the court sustained the demurrer on the ground that it failed to state a cause of action."

While it is true that a judgment upon demurrer is as good an estoppel as is any other form of judgment, it might very well be as is held in that case, that it is not an estoppel where in an action to quiet title the cause of action attempted to be set forth in the cross-complaint had no proper place in the action to quiet title; and as the Court very properly says:

> "The only thing appearing upon the face of the judgment to have been adjudged in the former action is the title of Parlin, the plaintiff herein, to the land in question, and his right to have such title quieted, and that judgment was entered upon the default of the defendant, the plaintiff here, which was an equivalent to a disclaimer on his part to any claim or title to said land. In other words, he acquiesced in the rescission of the contract on the part of Parlin,

> and falls back upon his right resulting from such rescission to recover the money paid, laid out and expended while the contract subsisted."

In the case at bar, as we have remarked, there never has been, either in the action of ejectment of *Springe v. Brown et al.* or in this action, any rescission of the contract. And the *fact* of *rescission* is the foundation of the decision in the case of *Heilig v. Parlin, supra.* This leads us to remind the Court that the complaint in *the case* at bar alleges specifically that Springe brought an action of ejectment to recover the possession thereof and "thenceforth repudiated the aforesaid contract and agreement and abandoned the same and treated the same as rescinded". This allegation of the complaint was specifically denied in the answer except in so far as it relates to the action of ejectment. The proof shows no rescission whatever of the contract, but, as we have pointed out, establishes conclusively that Springe stood upon the contract and standing upon it brought ejectment to oust the other party from his possession under the contract, because he had defaulted in it.

3. Even without particularizing with respect to the exact issues in the action of ejectment referred to, it must appear at once that the judgment rendered therein is necessarily a bar to this action.

All we need to consider in this action is that the vendor, Springe, the defendant in error, in the action of ejectment referred to, *claimed* that the vendee, Brown, *was in default* under the contract

of date September 20, 1906; and that Brown in the same action of ejectment, claimed that he was *not in default*—because the tender of the deed by Springe to him and demand for final payment under the contract were made upon a *legal holiday.* If the claim of Springe in the action of ejectment was established by the judgment of the Court, then Brown and his assignees are estopped forever after from controverting *the fact* of Brown's default under the contract.

A vendor cannot prevail in an action of ejectment against his vendee in possession when the latter asserts his right to continue such possession pursuant to a contract of sale under which he took such possession, without showing that he, the vendor, is

(a) Not in default; and

(b) That the vendee is in default.

A judgment, therefore, in favor of the vendor in an action of ejectment, where the vendee is in possession under a contract of sale, and is asserting his right to hold such possession, pursuant to the contract, cannot be rendered without a determination in said action that the vendee is in default under the contract. And such determination is conclusive and binding upon the parties so long as that judgment stands.

In the present instance, without looking any further into the record, we find that the vendor, Springe, prevailed in the action of ejectment; that

the Court gave judgment for him against the vendee, Brown; and we know that this judgment could not be rendered unless the trial Court in the action of ejectment had found the vendee, Brown, to be in default. The successor of the vendee, J. Dalzell Brown, therefore, is *estopped* to urge in this Court, and in all other courts, (1) that his assignee, Brown, was not in default under the contract of sales; (2) that the defendant in error, Springe, was in default under the contract of sale; or (3) that the contract of sale was rescinded by mutual consent of Springe and Brown or by Brown. This being so, the plaintiff in error, of course, cannot recover in this—or in any court—the moneys paid under the contract of sale. For, the right of a vendee, under a contract of sale, to recover moneys paid by him to the vendor, exists only when the vendee, himself, is not in default and the vendor is in default, or where the contract has been rescinded by mutual consent of the vendor and vendee, neither of which conditions exists in this case.

This particular view was the view which appealed to the judge of the Court below and we think that the law on this point could not be better stated than in the language of Judge Van Fleet, as follows:

> "The rule is aptly stated by Mr. Freeman in his very excellent work on judgments as to what is concluded by such an adjudication. 'An adjudication,' says Mr. Freeman, 'is final and conclusive not only as to the matters actually determined, but as to every other

matter which the parties might have litigated, and have decided as incidental to or connected with the subject matter of litigation, and every matter coming within the legitimate purview of the original action both in respect to matters of claim and of defense. * * *

'The defendant must bring forward all the defenses which he had to the cause of action asserted in the plaintiff's pleadings at the time the action was commenced.'

And again: 'To render a matter *res judicata,* it is not essential that it should have been distinctly and specifically put in issue by the pleadings.'

Now, in this case, we have this situation. Here was this contract of sale and purchase. Under its terms the purchaser was put in possession. He made the first payments, and it came down to the point of final payment. He failed to pay under circumstances which, in the judgment of the plaintiff to the action constituted a breach, whereupon by a course thoroughly well established as to the rights of the parties under circumstances, he brought his action in ejectment to oust the purchaser. While that action, independently considered, did not essentially involve the contract, in this instance it was based upon the contract because, necessarily, the plaintiff in the action could not recover unless he established a breach by the defendant under that contract.

It may be conceded, as has been suggested, that, had Mr. Brown seen fit to refuse to appear, or had simply put in a negative defense and let judgment go,—I am willing to concede that the judgment would have concluded nothing except the question as to the right of possession. But he did not do that. He saw fit not only to interpose his negative response to the title of the plaintiff, but he set forth his supposed rights under this contract whereby

he sought to establish the fact that he was holding within its terms. When he did that, he submitted the entire controversy, not only as based upon what was in those pleadings, but whatever he might have stated in the way of defensive matter to show that he was not in default under that contract. We took the ground in his defense to that action that the plaintiff was not entitled to recover because, notwithstanding the last payment had not been made in accordance with the terms of the contract,—which he admitted to be then due and payable,—that the plaintiff had failed to tender to him a deed which would carry a merchantable title. He stood upon that defense, and it was adjudged against him. Now, mind you, if he had a good defense in connection therewith which would have shown to the court that in fact, by reason of the subsequent agreement between the parties, time as the essence of the contract had been waived as to the payment which remained to be made, and that no subsequent notice had been given him, and that, therefore, he was not in default in that last payment, unquestionably the judgment must of necessity, had the fact so found, gone in his favor, because that would have shown that the action in ejectment was premature; that the plaintiff in fact had no cause of action, because of the existence of this contract, and which, supplemented by the subsequent arrangement between the parties, would have shown that the last payment was not in fact due, and that, therefore, as the matter then stood, Mr. Brown was rightly in possession until such time as he was put by proper notice to the necessity of meeting the last payment; and that, of course, would have rested upon the tender to him of a proper deed conveying title. He did not do that. He rested upon the defense that I have indicated. Now, under, the rule that I have stated as to what

> is included in a judgment under such issue it seems to me that that was his own fault. If he had such a defense as is now claimed, he should have pleaded it in his answer, in accordance with the facts; and if sustained, he would undoubtedly have prevailed. He failed to do that. He set up a state of facts at variance indeed with what his assignee now claims to have been the real facts of the transaction. But the whole controversy was submitted to the court under those pleadings. The fact that there was the defect in Brown's defense as the evidence now would tend to disclose, could make no difference. The question that was in issue in that case,—and carrying with it everything essential to a judgment upon the issues,—was the question of possession. And when the court determined under the issues that were there presented that the defendant was in default under this contract, and that, therefore, the plaintiff was entitled to possession, it necessarily included a finding of everything which the defendant might have set up in that connection which would have tended to a different conclusion. That is the case as it presents itself to my mind, and I am unable to see my way clear to avoid the conclusion that results from it."

That Judge Van Fleet was correct in his statement regarding the law and his application of that law to the present situation is hardly open to question.

It is established law that a judgment in an action is an estoppel between parties and their privies in any subsequent proceedings involving the *same cause of action,* not alone upon everything which

was litigated but upon everything which might have been litigated in that action.

In *Bingham v. Kearney,* 136 Cal. 177, the Court says:

> "It is the rule, long recognized in this country, that a judgment between the same parties is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question, *and upon all matters involved in the issues which might have been litigated and decided in the case,* the *presumption being that all such issues were met and decided.* It is the policy of the law to put an end to litigation, and to aid the vigilant and not those who sleep upon their rights. It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated; *neither will the law allow the parties to trifle with the courts by piecemeal litigation.* When plaintiff was brought into court by defendant in the former case, she certainly knew her rights. If she wished to rescind the contract, or if she had rescinded it, as she said in her answer she had done, then and there was the time to present her pleadings and evidence and insist upon all rights to which she was entitled under the law. If she could not get the award of the law upon the facts in the lower court, she could have appealed. She did not do so. She is now met by the presumption that all the facts and matters in controversy were disposed of in the former suit, and the further presumption that the judgment in the former suit is correct. If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The

principles herein stated are elementary. They are stated in the late case of *Quirk v. Rooney,* 130 Cal. 510." (The italics are ours.)

*Bingham v. Kearney,* 136 Cal. 177.

In *Belger v. Sanchez,* the Court says:

"In an action of ejectment, where the defendant by cross-complaint sets up a contract of sale executed by the plaintiff, under which he entered into possession, and claims performance on his part and non-performance on plaintiff's part, it is competent for the court finally to adjudge the rights of both parties under such contract."

*Belger v. Sanchez,* 137 Cal. 615.

See also,

*Greer v. Greer,* 142 Cal. 519;

*Allen v. Allen,* 159 Cal. 195;

*Estate of Bell,* 153 Cal. 331.

It has been held that a judgment in a suit of ejectment is *res adjudicata* as to all rights in property at the time of trial.

*Thrift v. Delaney,* 69 Cal. 191;

*Marshall v. Shafter,* 32 Cal. 176.

In *Reed v. Cross,* 116 Cal. 473, the Court says:

"A judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, or other proceeding providing for its revision."

The *default* of Brown, having been established in the action of ejectment, it effectively forfeits all his rights under the contract, and the vendor has an absolute right to consider it forfeited.

*Commercial Bank v. Weldon,* 148 Cal. 601;
*Skookum Oil Co. v. Thomas,* 162 Cal. 539.

Another branch of this proposition is, that even a matter which is not properly litigable in a controversy, but which is brought into the controversy by a party to it and litigated, is concluded by the judgment. As fine an illustration of this principle is presented by an action to foreclose a mortgage, which, it is familiar law, does not involve an issue as to the title to the property. Nevertheless, if the parties choose to litigate the question of title, the judgment is conclusive upon that question.

See

*Cromwell v. County of Sacramento,* 94 U. S. 351.

See also

*Bingham v. Kearney,* 136 Cal. 177, *supra.*

In the present case the judgment is conclusive upon either theory, for, as we pointed out under I, *supra,* a judgment ousting the vendee from his possession of the property under a contract of sale cannot be rendered in favor of the vendor unless it is adjudged that the vendee is in default under the contract.

See cases, *supra.*

## III.

### OTHER GROUNDS FOR NON-SUIT.

In addition to urging the correctness of the judgment of the lower Court in granting defendant in error's motion for non-suit, upon the ground that the judgment in the action of ejectment was *res adjudicata* and a bar to the action by plaintiff in error, we also urge each and every of the remaining nine grounds for non-suit, presented by defendant in error on the trial below. We submit that it affirmatively appears from the foregoing brief that each and every of the said grounds for non-suit urged were well taken.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco,
October 15, 1917.

LUTHER ELKINS,
RICHARD P. HENSHALL,
*Attorneys for Defendant in Error.*